# Appeal Board/Agency Shop Developments – 2003

## Public Employment Relations Commission
## Appeal Board

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The Legislature, rather than the Judiciary, headlined last year's public sector union security news in New Jersey. As detailed in other conference handouts, the passage of *P.L.* 2002, *c.* 45. allows a majority representative to petition for the right to levy representation fees if it cannot secure that privilege through collective negotiations. Because all public sector agency shop agreements implicate First Amendment rights, this handout reviews court decisions from across the country as well as some pertinent private sector agency shop rulings.

### 2002 Agency Shop cases: Form Equals Substance

Whether a majority representative has successfully negotiated or petitioned for the right to assess nonmembers representation fees in lieu of dues, the requirements of *N.J.S.A.* 34:13A-5.5 and 5.6 apply. These laws provide that a union may not receive representation fees in lieu of dues from nonmembers in the unit it represents unless it maintains a demand and return system to allow fee payers to challenge the amounts they are assessed. The United States and New Jersey Supreme Courts have held that these procedures must provide for "advance reductions" rather than "rebates" of fees. *Chicago Teacher's Union v. Hudson*, 475 *U.S.* 292 (1986); *Boonton Bd. of Ed. v. Kramer*, 99 *N.J.* 523 (1985), *cert.* den. sub. nom. *Kramer v. Public Employment Relations Comm.*, 475 *U.S.* 1072 (1986).

The regulations listing the mandatory elements of the demand and return system require that persons who pay a representation fee must receive, in advance of fee collections, a notice adequately explaining the financial basis for the fee. *N.J.A.C.* 19:17-3.3. The notice, sometimes called a "*Hudson* notice," must describe the majority representative's expenditures for its most recent fiscal year with a breakdown allocating expenses between costs that can be assessed to nonmembers and those outlays which cannot legally be supported by

nonmember fees. Nonmembers must be afforded at least 30 days after receipt of the notice to file an objection. *N.J.A.C.* 19:17-4.1.

One of the rules provides that the statement issued to nonmembers be "verified by an independent auditor or by some other suitable method." *N.J.A.C.* 19:17-3.3(a)(1). The Public Employment Relations Commission Appeal Board has held that the verification requirement applies to financial information, rather than whether the statement has accurately labeled a particular expense as chargeable or nonchargeable. *Daly v. High Bridge Teachers' Ass'n*, A.B.D. No. 89-2, 15 *NJPER* 139 (¶20059 1989).

Recent agency shop decisions have involved the details and purpose of *Hudson* notices. The cases appear to be inconsistent, but the United States Supreme Court has not yet decided to weigh in.

## Public Sector

### *Cummings v. Connell*, 316 *F.*3d 886 (9th Cir. 2003)

Nonmembers in a unit represented by the California State Employees Association sued both the CSEA and the State, asserting that CSEA's fair share fee notices violated *Hudson* and that the indemnification agreement in the State-CSEA contract violated public policy. The district court (177 *F. Supp.* 2d 1060) had held that the CSEA's notices were inadequate because they lacked specific financial information and because a copy of the audit of CSEA expenditures was not sent to non-members. On appeal, the Ninth Circuit rejected the nonmembers' contention that an allocation audit was required, as the purpose of the notice is to show a breakdown between chargeable and nonchargeable expenses, not to verify that the allocation was correct. It held that the district court: (1) erred in ordering partial restitution to all class members because a subsequent *Hudson* notice was valid; (2) rightly refused to enter judgment against state officials as their actions were just the routine collection of fees; and (3) rightly denied an injunction as the union was unlikely to revert to a deficient *Hudson* notice.

### *Byrd et al., v. AFSCME Council 52*, 781 *N.E.*2d 713 (Ind. App. 2003)

State employees who had declined to join AFSCME sued to recover fair share fees. After ruling that an executive order allowing the fees was valid, the Court considered the

nonmembers' claim that *Hudson* required AFSCME to perform an "allocation audit," i.e., an audit of the allocation of chargeable and non-chargeable expenses. Observing that the nature of the verification mentioned in *Hudson* is not entirely clear, the Court held that the audit requirement is designed to ensure that the usual function of an auditor is fulfilled, i.e. to ensure that the expenditures which the union claims it made for certain expenses were actually made for those expenses, as opposed to the legal determination of whether expenses are chargeable. The Court also reviewed whether the union had adequately proven the chargeability of the expenses listed in its *Hudson* notice and remanded the case to the district court for a determination of unresolved factual issues.

***Wagner v. Professional Engineers in California Government,* 2002 *U.S. Dist. LEXIS* 9396, 169 *L.R.R.M.* 3167 (ED CA 2002)**

State employees who were not members of PECG were assessed "fair share fees" from April 1 to October 31, 1999. In March 1999, PECG sent a *Hudson* notice to the employees explaining the basis for the fee and the objection procedures. The notice explained that the fee was set by doing an expense spreadsheet analysis of a twelve-month period (November 1997 through October 1998) from the audited 1997-1998 financial statement as prepared by an independent accounting firm. Plaintiffs alleged that the notice was improperly audited and, therefore, unconstitutional. The Court held that the notice information had not been audited by an independent accountant for the purpose of determining whether the union actually spent the amounts of money it claimed to have spent on the chargeable activities; thus the union had not satisfied the notice requirements of the First Amendment. The union had not carried its burden of establishing that the expenditures were lawful. Because the union failed to issue a constitutionally proper notice, the entire non-chargeable portion of the agency fee collected had to be returned.

***Wessel v. City of Albuquerque,* 299 *F.*3d 1186 (10th Cir. 2002)**

Thirteen non-union members alleged that the City violated their First Amendment rights through the compulsory deduction of union fair share fees from their wages. The district court granted summary judgment to the

nonmembers on their second claim for relief, holding that the union's *Hudson* notice was unlawful and violated the nonmembers' constitutional right to disclosure of sufficient information to gauge the propriety of the union's fee. The Court awarded nominal damages of $1.00 but denied injunctive relief and granted defendants summary judgment on all other claims. Both parties appealed and in the interim, the union issued a corrected notice and pledged to include the required information in future notices. The appeals court ruled that issuing a deficient notice, later corrected, did not entitle nonmembers to a refund of all fees, only a return of the non-chargeable portion. It remanded the case to determine which activities of affiliated unions were germane to collective bargaining to determine how much of the fees sent to those affiliates were chargeable. The court also held that the indemnification clause was too broad and therefore invalid and against public policy. Reasoning that the City could be indemnified against errors made by the union, the Court ruled that a government employer also is responsible for insuring that the rebate procedures are not constitutionally infirm. It held that both parties to a fair share agreement are responsible to see that *Hudson* is followed.

***Harik v. California Teachers Assn.*, 298 *F*.3d 863 (9th Cir. 2002)**

Plaintiff teachers sued numerous teachers' associations and school superintendents alleging that the representatives did not provide an adequate explanation of their agency shop fees because they did not give the non-union member teachers audited financial statements. On appeal from the district court's grant of summary judgment for the non-member teachers, the Court held that the district court erred by requiring all unions to provide audited financial statements as part of their *Hudson* notice to the teachers. The court held that a formal audit was not required, but the union must provide a statement of its chargeable and non-chargeable expenses together with independent verification that the expenses were actually incurred. The Court further held that the district court erred by ruling that the superintendents were liable for the unions' failure to give audited financial statements to nonmembers, as they were not responsible to ensure the adequacy of the unions' *Hudson* notice before deducting agency shop fees.

***Prescott v. County of El Dorado*, 298 *F*.3d 844 (9th Cir 2002) *cert.* den. 154 *L. Ed.* 2d 1019 (2003)**

Prior decisions in this ongoing dispute which had gone up to and back from the United States Supreme Court [528 *U.S.* 1111 (2000), vacating 177 *F*.3d 1102 (1999)] had held that the *Hudson* notice provided to nonmembers was inadequate. The appeals court now held that the nonmembers lacked standing to challenge an indemnification clause contained in the agreement between the public employer and the majority representative. It ruled that the Union's inadequate notice, rather than the execution of the collective bargaining agreement, harmed the nonmembers. It noted that other Ninth Circuit cases had held that a public employer has no responsibility for ensuring the adequacy of the *Hudson* notice. The challenged indemnification clause caused neither the union to furnish, nor the plaintiffs to receive inadequate notice. The United States Supreme Court has declined review.

## Private Sector

***NLRB v. Oklahoma Fixture Co.*, 295 *F*.3d 1143 (10th Cir. 2001)**

The union imposed a "permit fee," equal to union dues to be paid by probationary employees during the second and third months of their employment. The employer deducted the fees and forwarded them to the union. Without notice to the union, the employer ceased the practice. The NLRB found this was an unfair labor practice. The court of appeals reversed. The employer claimed the permit fee deduction and payment to the union violated 29 *U.S.C.* §186 making it unlawful for an employer to pay any money to any labor organization which represents any of its employees. The Board rejected this assertion, finding that the permit fees fell within the exception of 29 *U.S.C.* § 186(c)(4) allowing the deduction of union dues pursuant to a written authorization. Even though 29 *U.S.C.* §158(a)(3) only prohibits requiring dues payments for the first 30 days of employment, the collective bargaining agreement provided that union "membership" did not begin until the 91st day of employment. Despite the fact that employees were not union members until their 91st day of employment, the Board claimed that the term "membership dues" as used in § 186(c)(4) should be broadly construed. Because the court concluded that the permit fees constituted a violation of 29 *U.S.C.* § 186, the employer's practice of doing so could not be enforced as part of the agreement nor could it amend it.

***UFCW v. NLRB*, 307 *F*.3d 760 (9th Cir.), cert. den. 123 *S. Ct.* 551 (2002)**

Nonmembers who paid only required dues, but chose not to join the union, contended that it was an unfair labor practice for the unions to use their dues to pay for the costs of organizing. The NLRB dismissed the charges, relying on its decision in *California Saw and Knife Works*, 320 *N.L.R.B.* 224 151 *L.R.R.M.* 1121, (1995), enf 'd sub nom. *International Association of Machinists & Aerospace Workers v. NLRB*, 133 *F*.3d 1012 (7th Cir.), *cert.* den., 525 *U.S*. 811 (1998), holding that nonmembers' dues may be used for a union's activities outside the bargaining unit, if those activities are "germane to the union's role in collective-bargaining, contract administration and grievance adjustment." Sitting *en banc*, the court found that the NLRB's ruling was consistent with the National Labor Relations Act, and held that the union was permitted to charge nonmembers the costs involved in organizing employees of other companies in the same competitive market as the employer of the bargaining unit it represented.